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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Case No. 77-1331

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR AMERICAN BROADCASTING COMPANIES, INC. IN OPPOSITION

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	II
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT	3
ARGUMENT	6
I. The Decisions Below Affirm Rather Than Impede Basic Principles Underlying The Fairness Doctrine	6
II. The Commission's Conclusions Under The Fairness Doctrine Are Not Inconsistent With This Court's Recent Commercial Speech Cases	11
CONCLUSION	13

TABLE OF AUTHORITIES

CASES: Page

Banzhaf v. *FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969) 4, 8
Bigelow v. *Virginia*, 421 U.S. 809 (1975) 12
Columbia Broadcasting System, Inc. v. *Democratic National Committee*, 412 U.S. 94 (1973) ..... *passim*
Friends of the Earth v. *FCC*, 449 F.2d 1164 (D.C. Cir. 1971) 8
Lehman v. *City of Shaker Heights*, 418 U.S. 298 (1974) 12
National Broadcasting Co. v. *FCC*, 516 F.2d 1101 (D.C. Cir. 1974), *vacated* July 11, 1975, *cert. denied*, 424 U.S. 910 (1976) 7
Neckritz v. *FCC*, 502 F.2d 411 (D.C. Cir. 1974) 8
Public Interest Research Group v. *FCC*, 522 F.2d 1060 (1st Cir. 1975), *cert. denied*, 424 U.S. 965 (1976) 7
Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969) 3, 7, 14
Retail Store Employees Union v. *FCC*, 436 F.2d 248 (D.C. Cir. 1970) 4
Straus Communications, Inc. v. *FCC*, 530 F.2d 1001 (D.C. Cir. 1976) 7
Virginia State Board of Pharmacy v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) 11-13

ADMINISTRATIVE DECISIONS AND REPORTS:

Editorializing by Broadcast Licensees, 13 FCC 1246 (1949) 3, 5
Notice of Inquiry, 30 FCC 2d 26 (1971) 4
WCBS-TV, 8 FCC 2d 381, *reconsideration denied*, 9 FCC 2d 921 (1967), *aff'd sub nom. Banzhaf* v. *FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969) 4, 5, 8

TABLE OF AUTHORITIES—Continued

Page

CONSTITUTIONAL PROVISIONS AND STATUTES:

First Amendment, U.S. Constitution ..... *passim*
Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.*:
Section 315(a) 2
Section 326 2

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OPINIONS BELOW

The opinion of the court of appeals has not yet been officially reported. It is reproduced in Appendix A to the petition filed by the National Citizens Committee for Broadcasting (hereinafter "NCCB"). The opinions of the Federal Communications Commission (hereinafter "Commission") are reported at 48 FCC 2d 1 (1974) and 58 FCC 2d 691 (1976), and are reproduced as Appendix B and Appendix C, respectively, to NCCB's petition.

JURISDICTION

The judgment of the court of appeals was entered on November 11, 1977. The Petition for a Writ of Certiorari was filed on March 20, 1978. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the court below erred in holding that the Federal Communications Commission acted within its discretion, and consistent with applicable constitutional and statutory principles, in deciding that ordinary product advertisements do not constitute statements on controversial issues of public importance and that the broadcast of such advertisements does not invoke reply obligations under the fairness doctrine?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent constitutional and statutory provisions which ABC believes are involved include the First Amendment to the Constitution and Sections 315(a) and 326 of the Communications Act of 1934, as amended. The First Amendment and Section 315(a) are set forth at pages 2-3 of NCCB's Petition.

Section 326 of the Communications Act of 1934, as amended, 47 U.S.C. § 326, provides as follows: "Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

STATEMENT

Respondent American Broadcasting Companies, Inc. (hereinafter "ABC"), itself or through its subsidiaries, is the licensee of radio and television broadcasting stations and the operator of radio and television broadcasting networks. ABC participated in each of the several phases of the Commission's extensive deliberations which led to the issuance of the 1974 *Fairness Report*[1] under review, and participated as an intervenor in the court below.

While the proceeding before the Commission was wide-ranging, taking into account all facets of the fairness doctrine,[2] Petitioner NCCB's attack is focused on that aspect of the Commission's report which dealt with the application of the fairness doctrine to broadcast announcements referred to as product "commercials" or "advertisements."

In establishing a separate phase of the proceeding concerning the applicability of the fairness doctrine to broadcast advertising, the Commission was reacting to contemporary developments that had placed a gloss of uncertainty over this subject matter. For instance, the Com-

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[1] 48 FCC 2d 1 (1974).

[2] The fairness doctrine, developed by the Commission and subsequently sanctioned by Congress and the courts, requires broadcast licensees (1) to cover controversial issues of public importance and (2) to present differing viewpoints on those issues. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 111 (1973); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 375-386 (1969). The Commission's general inquiry leading to the decision at issue represented the first major reassessment and clarification of the fairness doctrine in more than two decades. See *Editorializing by Broadcast Licensees*, 13 FCC 1246 (1949) ("Editorializing Report"). The review was structured to focus on four general areas: (1) the basic workings of the fairness doctrine; (2) application of the fairness doctrine to paid announcements; (3) access to the broadcast media for the discussion of public issues; and (4) the fairness doctrine and political broadcasts.

mission referred to a then-recent decision of the Court of Appeals for the District of Columbia Circuit[3] wherein the court had suggested that the Commission should, *inter alia*, give "fuller analysis" to whether ordinary product advertisements for a department store engaged in a labor dispute might be considered to address a controversial issue of public importance, thereby invoking fairness obligations. The decision in *Retail Store* also highlighted the question of whether the Commission's *Banzhaf* ruling[4]—attaching fairness doctrine reply obligations to the broadcast of cigarette advertisements—should be limited solely to cigarettes.

Accordingly, faced with conflicting and escalating pressures to expand application of the fairness doctrine to an increasing variety of broadcast advertisements,[5] the Commission considered an overall public inquiry to be a necessary and appropriate forum in which to explore these problems and reach solutions:

> "In the circumstances, we believe that an overall inquiry is the best way to proceed, thus allowing for maximum participation and maximum opportunity for sound policy formulation . . . . The issue really is the right of access, if any, to the broadcast media to respond to product commercials." 30 FCC 2d at 30.

The administrative inquiry that ensued was exhaustive. In addition to several separate opportunities for written

[3] *Retail Store Employees Union* v. *FCC*, 436 F.2d 248 (D.C. Cir. 1970).

[4] *WCBS-TV*, 8 FCC 2d 381, *reconsideration denied*, 9 FCC 2d 921 (1967), *aff'd sub nom. Banzhaf* v. *FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

[5] As the Commission observed in its *Notice of Inquiry* [30 FCC 2d 26 (1971)], "almost without exception, product commercials can be argued to raise some significant, controversial issue—and as public awareness grows, so, too, does the occasion for making such arguments." 30 FCC 2d at 31.

comments, the Commission conducted special panel discussion sessions and held extensive oral argument. Participation was widespread and included broadcasters, public interest groups, government agencies, consumer groups, labor unions, academicians, and others.

In most respects, the Commission's 1974 *Fairness Report* constitutes a reaffirmation and elaboration of general fairness doctrine principles first enunciated in the 1949 *Editorializing Report* and interpreted and modified in case-by-case rulings during the ensuing years. However, the Commission also overruled its 1967 *Banzhaf* decision, deciding instead that ordinary product commercials do not make a "meaningful contribution toward informing the public on any side of any issue" and that such advertisements should not therefore be considered as falling within the scope of the fairness doctrine. 48 FCC 2d at 24. The Commission reasoned that the public interest would not be served by "stretch[ing] the fairness doctrine in an artificial way [to apply] it to commercials which play no meaningful or significant role in the debate of controversial issues." *Id.* at 28. The Commission therefore announced that, in the future, it would "apply the fairness doctrine only to those 'commercials' which are devoted in an obvious and meaningful way to the discussion of public issues." *Id.* at 26. At the same time, the Commission emphasized that other commercial announcements, such as editorial advertisements, and institutional advertising that "obviously addresses, and advocates a point of view on, a controversial issue of public importance" (*Id.* at 23), would continue to give rise to fairness obligations.

On petitions to review, the court below unanimously affirmed—on both constitutional and statutory grounds—the foregoing Commission ruling. First, it rejected "the suggestion that any speech protected by the first amendment must, as a matter of constitutional law, trigger

application of the fairness doctrine" (NCCB Pet., App. A, p. 21a). As the court explained, "[t]here is an obvious difference between the standard employed by the Commission for determining whether the fairness doctrine applies to advertisements—that is, whether the advertisement advocates one side of a controversial public issue—and [this Court's] holding in *Virginia State Board* that advertising is protected by the first amendment because it represents dissemination of valuable information important to the functioning of a free enterprise system." *Id.* Second, as to the statutory challenge, the court determined that "[a]s long as the Commission strictly enforces the . . . fairness obligation to present opposing points of view whenever there is direct, obvious, or explicit advocacy on one side of a controversial issue of public importance, it will be acting consistently with the public interest standard" of the Communications Act (NCCB Pet., App. A, p. 27a).

ARGUMENT

In attempting to persuade this Court to grant review of the lower court decision, NCCB misconstrues the decisions below and misreads this Court's recent commercial speech cases. As both the Commission and the court of appeals recognized, application of the fairness doctrine to ordinary product advertising would subvert rather than enhance the essential purposes of that basic policy. Similarly, in suggesting that this Court's recent commercial speech cases demand an opposite result, NCCB errs in applying the holdings of those cases to fairness doctrine principles.

I. The Decisions Below Affirm Rather Than Impede Basic Principles Underlying The Fairness Doctrine

NCCB characterizes the decisions below as constituting a fundamental departure from past practice and princi-

ples that will seriously erode critical elements of our system of broadcasting. On the contrary, it is NCCB's unadopted theories that would dramatically depart from the Commission's long-standing administration of the fairness doctrine.

While the Commission is charged with administering and interpreting the fairness doctrine, that regulatory responsibility has been carefully tempered so as to avoid infringements upon licensee discretion in the selection and scheduling of program matter.[6] The Commission's 1974 *Fairness Report* represents a careful bridging of these important principles. The Commission proceeded by general inquiry in an effort to define standards and set workable limits to govern a basic communications policy it has been entrusted to administer. *Public Interest Research Group* v. *FCC*, 522 F.2d 1060, 1066-67 (1st Cir. 1975), *cert. denied*, 424 U.S. 965 (1976). It has done so, however, with full recognition of the imposing constitutional restrictions on its involvement in the program and editorial judgments of broadcast licensees.

NCCB seeks to extend the fairness doctrine beyond this line of applicability carefully drawn by the Commission. The new regulatory vistas sought by NCCB would, however, undermine the essential purposes of the doctrine and violate the constitutionally protected concept of li-

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[6] See *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 104-05 (1973) (hereinafter *CBS* v. *DNC*); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 396 (1969); *Straus Communications, Inc.* v. *FCC*, 530 F.2d 1001, 1007 n.11 (D.C. Cir. 1976); *National Broadcasting Co.* v. *FCC*, 516 F.2d 1101 (D.C. Cir. 1974), *vacated* July 11, 1975, *cert. denied*, 424 U.S. 910 (1976). In the latter case, the court of appeals observed that "the same statute that provides authority for the FCC to implement the fairness doctrine . . . contains a clear provision (in Section 326) disclaiming and prohibiting censorship as part of the legislative scheme. In construing the fairness doctrine, both the Commission and the courts have proceeded carefully, mindful of the need for harmonizing these often conflicting considerations." 516 F.2d at 1111.

censee discretion upon which it is founded. What NCCB characterizes as an improper "gap" in the Commission's administration of the doctrine—i.e., the failure to approve an expansive utilization of the policy in the area of commercial advertising—is, in fact, a compelling response by the agency to these strongly imbedded constitutional and statutory values.

NCCB has also miscast the context in which the Commission's product commercial ruling was reached. It did not represent a sharp reversal of a long line of precedent. In fact, there was no defensible precedent at all until the 1967 *Banzhaf* decision when, in a highly controversial and emotional setting, the Commission applied the doctrine to the advertising of a single product—cigarettes. That decision, rather than affirming past interpretations, was essentially a precedent-shattering aberration that soon disclosed the implications and difficulties of applying the doctrine generally to product advertising. It set in motion a period in which an increasing number of questions arose concerning the wisdom and practicality of such an approach.

The general inquiry that followed was thus initiated amidst decisional turmoil and uncertainty, not against a backdrop of long-established and clearly defined policy as NCCB would suggest. The absence of clear-cut policy and the Commission's efforts to resolve the growing uncertainties also did not escape the attention of the courts. See, e.g., *CBS* v. *DNC*, *supra*, 412 U.S. at 131-32; *Neckritz* v. *FCC*, 502 F.2d 411, 415-17 (D.C. Cir. 1974); *Friends of the Earth* v. *FCC*, 449 F.2d 1164, 1170 (D.C. Cir. 1971).

The Commission's ultimate decision to exclude ordinary product commercials from fairness doctrine obligations was reached in a framework that assessed all relevant facts and circumstances. Relying on its many years of

experience in administering the doctrine, and weighing all of the contentions advanced, the Commission fashioned a solution that would best promote the underlying principles of the doctrine. The result, we respectfully submit, is one that offers the best hope for the effective implementation of the doctrine in the future.

First, since the purpose of the fairness doctrine is to promote informative discussion of important issues, the Commission properly determined that its application to advertising messages which merely urged the sale or use of a product or service would undermine and denigrate this fundamental purpose. The discussion of important public issues, the Commission reasonably found, can better proceed in different and in more informative contexts than through advertising messages oriented to the consumption or use of products and services.

The Commission was also legitimately concerned that a sweeping extension of the fairness doctrine to ordinary product advertising would thrust the government far too deeply into program content protected by the First Amendment. Since few commercials promoting the sale of products and services can escape someone's self-drawn inference traceable to some overall controversial issue,[7] the effect of applying the fairness doctrine to such broadcast announcements would be detailed scrutiny of all commercial content by the public, by broadcasters and, ultimately, by the Commission. Unavoidably, Commission involvement would be greatly expanded, with the intrusion of the government in licensee decision-making correspondingly escalated.

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[7] The court below referred to the "wide range of controversial products" that could become entangled in NCCB's suggested interpretation, citing the view of one commentator that the list of advertised products whose normal use could involve some significant issue is "virtually endless" (NCCB Pet., App. A, p. 30a).

Faced with all these concerns, the Commission concluded that "more meaningful ways" [8] were available for the presentation and discussion of important issues that may be involved in the purchase or use of certain products. Use of these other means, developed and implemented by broadcast licensees within the discretion entrusted to them and pursuant to the broad "public interest" standard, is a far better choice, the Commission found, than "a tortured or distorted application of fairness doctrine principles" [9] to a wide assortment of product commercials. The Commission's judgment on ordinary product advertising fully accords with this Court's holding in *CBS* v. *DNC*, *supra*, on editorial advertising:

> "If the Fairness Doctrine were applied to editorial advertising, there is also the substantial danger that the effective operation of that doctrine would be jeopardized . . . . *The result would be a further erosion of the journalistic discretion of broadcasters in the coverage of public issues, and a transfer of control over the treatment of public issues from the licensees who are accountable for broadcast performance to private individuals who are not.* The public interest would no longer be 'paramount' but, rather, subordinate to private whim . . . . *Under such a regime the congressional objective of balanced coverage of public issues would be seriously threatened.*" 412 U.S. at 124 (emphasis added).

If, as this Court has determined, it would be contrary to the public interest to permit the agenda for public issue discussion to be set by a mandated system of editorial advertisements, clearly the Commission is correct in rejecting an interpretation of the fairness doctrine that would permit that agenda to be dictated by ordinary product commercials.

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[8] *Reconsideration Order*, 58 FCC 2d at 698.

[9] *Fairness Report*, 48 FCC 2d at 27.

The Commission also recognized the need to develop standards which would preserve the fairness doctrine as a workable policy. Imposing the doctrine on ordinary product commercials would overwhelmingly magnify its coverage and thus threaten its viable administration and practical implementation. It would be increasingly unmanageable for broadcasters and the Commission to decide what issues were inferred from what product ads and whether such issues were sufficiently important to require a response. Aside from the exacerbated First Amendment problems, the shadings and variables involved would create an operational nightmare. Unlike the treatment of most public issues under the fairness doctrine, where the exposition of issues is usually limited in time and urgency, most product commercials for automobiles, gasoline, personal hygiene, grooming, etc., are necessarily continuous and repetitive. The result would be heightened confusion in which neither broadcasters nor the Commission would be able to determine with any degree of assurance the ramifications of even the most innocuous advertisements.

Sensibly, the Commission steered clear of these consequences, opting for the more workable set of standards it adopted. Rather than creating a "gap" in the administration of the fairness doctrine, as NCCB asserts, the Commission's ruling prevented an erosion that would have dramatically altered the effectiveness of the doctrine and undermined the First Amendment principles on which it is based.

II. The Commission's Conclusions Under The Fairness Doctrine Are Not Inconsistent With This Court's Recent Commercial Speech Cases

NCCB erroneously argues that this Court's decision in *Virginia State Board of Pharmacy* v. *Virginia Citizens*

Consumer Council, Inc., 425 U.S. 748 (1976)[10] requires the Commission to treat ordinary product advertisements as equivalent to actual discussions of public issues.

Virginia Pharmacy holds that commercial speech (prescription drug advertising) is entitled to First Amendment protection—at least to the extent that a state statute prohibiting the publication of prescription prices by pharmacists was ruled invalid. The case does not, however, undercut the validity of the Commission's conclusion that ordinary product commercials do not contribute to public debate on important issues.

For instance, in *Virginia Pharmacy* the prescription drug advertisements are described in a way that could easily be applied to most product advertisements:

> "Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters." 425 U.S. at 761.

This acknowledged difference in the forms of speech is, in fact, a central theme of the decision. Thus, elsewhere the Court stresses that,

> "[in] concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are common-sense differences between speech that does 'no more than propose a commercial transaction,' *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U.S. at 385, . . . and other varieties." 425 U.S. at 771 n.24.

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[10] Hereinafter cited as *"Virginia Pharmacy"*. Brief reference is also made to two earlier decisions containing the seeds of the views that culminated in *Virginia Pharmacy;* namely *Bigelow* v. *Virginia*, 421 U.S. 809 (1975) and *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974) (Brennan, J., dissenting).

Mr. Justice Stewart, in a Concurring Opinion, further observes that the Court's holding carves out and recognizes "that there are important differences between commercial price and product advertising, on the one hand, and ideological communication on the other." *Id.* at 779.

This is essentially the same distinction the Commission has drawn here—albeit for different purposes. Speech can impart facts and not be part of public debate for fairness doctrine purposes. It is the Commission's responsibility to decide whether public debate and controversy are involved, and it has declared that they are not in the case of ordinary product commercials.

The Commission concluded that the public would be better informed about the important issues which may be associated with the use of products and services if "the decision to cover these and other matters of similar public concern" is made by each individual licensee "in the fulfillment of [its] public trustee responsibilities," and not by "a tortured or distorted application of fairness doctrine principles" to such announcements. 48 FCC 2d at 27. In reaching this conclusion, the Commission sanctioned an approach fully consistent with, rather than contrary to, decisions of this Court. Thus, as stated in *CBS* v. *DNC*, *supra*, the "paramount" interests of the public are best served if the agenda for discussion of public issues on radio and television stations is set by the broadcaster, and not by advertisers (see p. 10, *supra*).

CONCLUSION

The Commission refused to give birth to a system that would, inevitably, permit the agenda for public issue discussion to be set by ordinary product commercials and the attention of broadcast licensees diverted to "the fairness implications of [such] ads." *Fairness Report*, 58 FCC 2d at 698. As such, the Commission's decision

affirmatively promotes the paramount First Amendment rights that, as this Court declared in *Red Lion*, reside in the public. Rather than disjointed discussions dominated by a parade of ordinary product advertisements, under the Commission's decision broadcasters will be free to devote their full attention to those issues that flow from the needs of the communities they serve.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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